

STATE OF MICHIGAN
COURT OF APPEALS

JOHN LAGALO,

Plaintiff-Appellee,

v

LORIE A. LAGALO,

Defendant-Appellant.

UNPUBLISHED

June 26, 2012

No. 303929

Lenawee Circuit Court

LC No. 09-034703-DO

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's judgment of divorce that awarded to plaintiff \$95,000 as separate property from the proceeds of the sale of the marital home. We reverse and remand.

FACTS AND PROCEDURAL HISTORY

This case involves the dissolution of a 37-year marriage. During the parties' marriage, plaintiff inherited, from his parents, a total sum of \$125,000, which was placed in the parties' joint account. While the money was moved a couple times, the funds ultimately were placed in a joint account belonging to both plaintiff and defendant and \$96,000 was used from that amount to pay off the marital home. While defendant also received an inheritance, it was after the parties' separation and was never commingled.

During the course of the divorce proceedings, defendant requested that the trial court approve the sale of the marital home for \$275,000, which was granted, and the funds were placed in escrow. Plaintiff then filed a separate property claim to \$95,000 of those funds which plaintiff asserts is money from his inheritance and therefore, should not be divided between himself and defendant. Defendant correctly relied on *Cunningham v Cunningham*, 289 Mich App 195; 795 NW2d 826 (2010), arguing that once the funds from plaintiff's inheritance were placed into the joint account and used to pay off the mortgage, it lost its status as separate property. Plaintiff's attorney responded during argument by incorrectly stating that *Cunningham* is an unpublished case and has no precedential value. The trial court followed plaintiff's assumption and stated that, as an unpublished case, *Cunningham* had no value and it would not follow *Cunningham*. While the trial judge ultimately rendered a decision on this matter at the parties' divorce trial, he found that the \$95,000 used to pay off the mortgage was separate property and therefore belonged to plaintiff.

Defendant, citing *Cunningham*, appeals arguing that the funds were commingled with the marital estate such that the funds lost their separate property character. We agree.

STANDARD OF REVIEW

In a divorce action, a trial court's factual findings related to the division of marital property are reviewed for clear error, while issues of law are reviewed de novo. *Cunningham*, Mich App at 200. Clear error will be found if this Court is left with a "definite and firm conviction that a mistake has been made." *Id.* (Internal citations omitted). This Court will affirm a decision regarding a court's division of property, unless we are "left with the firm conviction that the division was inequitable." *Pickering v Pickering*, 268 Mich App 1, 7; 706 NW2d 835 (2005).

ANALYSIS

Before a trial court divides marital property, it must first determine if the property is actually marital or separate property. *Cunningham*, 289 Mich App at 200-201 (citing *Reeves v Reeves*, 226 Mich App 490, 493-494; 575 NW2d 1 (1997)). The general rule is that marital property is property received during the marriage and separate property is received before the marriage. *Id.*; MCL 522.19. However, some property received during the marriage can be separate property; inheritance represents an example of such income received during marriage that is traditionally considered separate property. *Dart v Dart*, 460 Mich 573, 584-585; 597 NW2d 82 (1999). However, separate assets can lose their character as separate property if they are commingled with marital assets and treated as marital property. *Cunningham*, 289 Mich App at 201. Whether property is held jointly or individually is not indicative of its true character. *Id.* at 202. The true test to determine its character is by looking towards the actions of the parties. *Id.* at 209.

The trial court incorrectly characterized the \$95,000 as separate property merely because the funds originated from plaintiff's inheritance. The inheritance could only have retained its character as separate property by being kept and treated as separate property. *Cunningham*, 289 Mich App at 201. In *Cunningham*, this Court found that the defendant's award of workers compensation was originally separate property, but it became marital property when the defendant commingled the property with marital property and jointly used it to purchase the marital home. The action of using it with marital property and buying the marital home caused the character of the property to change. *Id.* at 210.

The case at bar is a very similar situation. Even though plaintiff received an inheritance instead of workers compensation, it was originally separate property. Plaintiff then took that property and commingled it with marital property by placing it in a joint account and using it to pay off the mortgage on the marital home. These actions led to the property being characterized as marital and no longer separate. The trial court therefore erred in holding that, due to the original nature of the property, the property remained separate.

The trial court therefore also erred by apportioning the \$95,000 to plaintiff prior to equitable division. Generally, before division of the marital estate, each party first takes away from the marriage that party's "own separate property with no invasion by the other party."

Cunningham, 289 Mich App at 201 (citing *Reeves*, 226 Mich App at 494). After that, the trial court may apportion the marital estate equitably. *Byington v Byington*, 224 Mich App 103, 112-113; 568 NW2d 141 (1997). Because the \$95,000 is marital property, it should have been included in the whole of the marital estate and subject to equitable division.

Plaintiff argues that even if the court erred in finding the \$95,000 to be separate property, the trial court ultimately divided the property equitably and therefore, reversal is not appropriate. However, plaintiff misapprehends the standard. This Court will reverse a trial court's division of the marital estate only if it is left with a firm conviction that the division of the marital property was inequitable. *Pickering*, 268 Mich App at 7; see also *Sands v Sands*, 442 Mich 30, 34-35; 497 NW2d 493 (1993) (explaining that the division of property *must* be equitable). Plaintiff's argument would require this Court to hypothetically place the \$95,000 back into the marital estate and speculate whether the division, as the trial court promulgated, was still equitable. The standard requires this Court to review the division of the marital property, as the trial court apportioned it, to determine whether it was equitably divided. Whether the trial court would have apportioned the \$95,000 in the same way, had the trial court properly characterized it, is therefore irrelevant. See *Reeves*, 265 Mich App at 157 (holding that, when a trial court errs in "the first necessary step of making an equitable division of property, determining what property should be included in the marital estate and what property is separate property [,]... it is premature to address [the issue of equitable division]").

Because the trial court erred in classifying the \$95,000 as separate property and removing it from the marital estate, it is not necessary for this Court to consider whether the division was equitable. It would be a premature analysis because the property must correctly be classified before this decision is made.

CONCLUSION

The judgment of divorce is reversed, and the matter is remanded for the trial court to divide the property between the parties with the \$95,000 included as marital property. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Amy Ronayne Krause